

**IN THE MATTER OF THE CLAIM
OF JACK GUMBERT,
CLAIMANT
AGAINST THE MARYLAND HOME
IMPROVEMENT GUARANTY FUND
FOR THE ALLEGED ACTS OR
OMISSIONS OF GARY
LABANOWSKI, T/A ATLAS
CONTRACTING, INC.,
RESPONDENT**

*** BEFORE TRACEY JOHNS DELP,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
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* OAH No.: LABOR-HIC-02-19-23153
* MHIC No.: 18 (90) 1056

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PROPOSED DECISION

STATEMENT OF THE CASE
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STATEMENT OF THE CASE

On September 10, 2018, Jack Gumbert (Claimant) filed a claim (Claim) with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$22,100.00 in actual losses allegedly suffered as a result of a home improvement contract with Gary Labanowski, trading as Atlas Contracting, Inc. (Respondent). Md. Code Ann., Bus. Reg. §§ 8-401 through 8-411 (2015 & Supp. 2019).¹ On July 8, 2019, the MHIC forwarded the matter to the Office of Administrative Hearings (OAH) for a hearing.

¹ Unless otherwise noted, all references to the Business Regulation Article herein cite the 2015 Replacement Volume of the Maryland Annotated Code.

I held a hearing on January 6, 2020, at the OAH in Hunt Valley, Maryland. Bus. Reg. § 8-407(e). Andrew Brouwer, Assistant Attorney General, Department of Labor (Department),² represented the Fund. The Claimant represented himself.³ After waiting approximately one hour for the Respondent or the Respondent's representative to appear, I proceeded with the hearing. Code of Maryland Regulations (COMAR) 28.02.01.23A.⁴

The contested case provisions of the Administrative Procedure Act, the Department's hearing regulations, and the Rules of Procedure of the OAH govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2019)⁵; COMAR 09.01.03; COMAR 28.02.01.

ISSUES

1. Did the Claimant sustain an actual loss compensable by the Fund as a result of the Respondent's acts or omissions?
2. If so, what is the amount of the compensable loss?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimant's behalf:

- Clmt. Ex. 1 - Complaint Form, with typed continuation page, April 4, 2018
- Clmt. Ex. 2 - Respondent Invoice, April 25, 2017⁶
- Clmt. Ex. 3 - Respondent Invoice, June 15, 2017

² On July 1, 2019, the Maryland Department of Labor, Licensing, and Regulation became the Department of Labor.

³ At approximately 9:10 a.m. on the morning of the hearing, the Claimant called the OAH to advise that he would be delayed. The hearing began upon his arrival time of approximately 10:30 a.m.

⁴ After review of Fund Exhibits 2, 3, and 4, as well as taking Official Notice of the OAH Notice of Hearing File Copy dated October 10, 2019, with stapled U.S. Postal Service® Certified Mail® receipt, I determined proper hearing notice was provided to the Respondent and proceeded to hear the captioned matter. Bus. Reg. § 8-312(h) ("If, after due notice, the person against whom the action is contemplated does not appear, nevertheless the Commission may hear and determine the matter."); COMAR 28.02.01.21F (Official Notice).

⁵ Unless otherwise noted, all references to the State Government Article herein cite the 2014 Replacement Volume of the Maryland Annotated Code.

⁶ The Claimant testified that the handwritten notation "Insulation was not changed or improved" was made by his wife.

- Clmt. Ex. 4 - Respondent Invoice, August 28, 2017
- Clmt. Ex. 5 - Check Number 151 from Claimant payable to Respondent for \$5,000.00, April 11, 2017⁷
- Clmt. Ex. 6 - Check Number 152 from Claimant payable to Respondent for \$5,000.00, April 27, 2017⁸
- Clmt. Ex. 7 - Check Number 153 from Claimant payable to Respondent for \$4,800.00, June 19, 2017⁹
- Clmt. Ex. 8 - Photograph of vanity corner, undated
- Clmt. Ex. 9 - Photograph of vanity, undated
- Clmt. Ex. 10 - Photograph of doorway trim, undated¹⁰
- Clmt. Ex. 11 - Photograph of family room ceiling damage, undated
- Clmt. Ex. 12 - Photograph of uneven tile floor, undated¹¹
- Clmt. Ex. 13 - Photograph of unfinished bathtub installation, undated¹²
- Clmt. Ex. 14 - Photograph of wall between vanity and shower, undated
- Clmt. Ex. 15 - Photograph of shower wall tile, undated¹³
- Clmt. Ex. 16 - Photograph of shower wall and floor, undated
- Clmt. Ex. 17 - Photograph of shower floor tile, undated
- Clmt. Ex. 18 - Photograph of second installation of shower tile, undated
- Clmt. Ex. 19 - Estimate from R. Solomon Construction Co., Inc., August 5, 2018

The Respondent did not appear at the hearing to submit any exhibits.

⁷ The account number was redacted for security purposes.

⁸ The account number was redacted for security purposes.

⁹ The account number was redacted for security purposes.

¹⁰ The Claimant testified that the handwritten notations on the photograph were made by his wife.

¹¹ The Claimant testified that the handwritten notation on the photograph was made by his wife.

¹² The Claimant testified that his wife notated the area of the bathtub without plumbing fixtures with a circle.

¹³ The Claimant testified that his wife notated an area of uneven tile with a circle.

I admitted the following exhibits on behalf of the Fund:

Fund Ex. 1 - Hearing order, July 1, 2019

Fund Ex. 2 - Notice of January 6, 2020 Hearing, October 10, 2019

Fund Ex. 3 - Letter from MHIC to Respondent, October 15, 2018, and Home Improvement Claim Form, received September 10, 2018

Fund Ex. 4 - Respondent's MHIC Licensure Information, printed January 2, 2020

Testimony

The Claimant testified and did not present the testimony of any other witnesses.

The Respondent did not appear at the hearing to testify or present the testimony of any other witnesses.

The Fund did not present the testimony of any witnesses.

PROPOSED FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor under MHIC license numbers 01-104490 (Contractor/Salesman) and 05-129784 (Corporation). (Fund Ex. 4.)

2. The Claimant is not related to the Respondent or any of his employees, by blood or marriage.

3. The Claimant is the owner of one home (subject property) in Maryland located in Bel Air, Harford County.

4. When the Claimant purchased the subject property, his real estate agent referred him to the Respondent. Thereafter, in 2013 and 2014, the Respondent performed home improvement projects on the first floor and in the basement of the subject property without incident.

5. In April 2017, the Claimant and the Respondent entered into a Contract for the Respondent to renovate the subject property second floor master bathroom, as outlined in the following three invoices prepared by the Respondent:

Date	Invoice No.	Description	Cost
4/25/17	16-791	Demo existing bathroom vanity tile and shower and bathtub. Frame to accommodate new tub and shower area. Plumb bathroom to accept new tub, vanity and shower. Shower to include shower wand and faucet. All rough in valves are included except shower trim and bath faucets. Wire bathroom to customer specs. Insulate and drywall bathroom, finish and paint. Install cement board in tub and shower area as well as all floors. Scope includes custom mud pan in shower and installation of customer provided tub. Tile floor, shower and tub area. Supply and install Schuler Ditra edging to all exposed tile areas. Grout and seal. Install vanity and all plumbing fixtures. Install all trim necessary to finish bath. Supply and install custom frameless glass shower door. All trim finishes to be selected by customer. Scope includes all protection in house from front door to bathroom area to protect house. Tile, vanity, vanity faucet, tub faucet, and shower trim not included in pricing.	\$15,000.00
6/15/17	16-819	Bathroom vanity - \$682.30 Bathroom granite - \$679.00 Bathroom fixtures - \$1,388.07	\$2,749.37
8/28/17	16-849	Supply and install electrical for vanity mirror. Supply and install new electrical wire for dimming vanity light and mirror - \$487.50 Additional electrical supplies – switches and TV mount, TV mount supplies - \$255.00 Blue Star tile - \$75.00 Floor tile - \$80.00	\$897.50
			Total: \$18,646.87

(Clmt. Exs. 2-4.)

6. The Contract did not describe when work would begin or be completed.

7. The Claimant made the following payments to the Respondent:

April 11, 2017, check 151	\$5,000.00
April 27, 2017, check 152	5,000.00
June 19, 2017, check 153	4,800.00
Unknown date, cash payment	<u>2,300.00¹⁴</u>
Total:	\$17,100.00

8. Contract work began in May 2017 and ended when the Respondent left the job in November 2017. (Clmt. Ex. 1.)

9. Despite calls placed by the Claimant to the Respondent's cell phone and office, the Respondent never returned to the subject property to complete the Contract.

10. The Respondent left various tools and supplies in the master bathroom and he left an extension ladder under the Claimant's deck.¹⁵

11. The home improvement for which the parties contracted was unworkmanlike, inadequate, and incomplete, as follows:

- the Respondent did not complete the scope of work;
- tile installation was not uniform or level, and grouting was inconsistent;
- glass shower doors were not installed;
- the shower window leaked and damaged the ceiling below as well as several items in the room below;¹⁶
- the doorway trim and door sizing were unworkmanlike; and
- the bathtub installation was incomplete.

¹⁴ The Claimant testified that although he could not remember when, he is certain that he made a \$2,300.00 cash payment to the Respondent because the Respondent requested him to do so. The Claimant's testimony was credible and was corroborated by Claimant Ex. 3, an invoice prepared by the Respondent which noted a \$2,300.00 payment/credit made by the Claimant.

¹⁵ The Claimant testified that approximately one year later, someone removed the Respondent's extension ladder from the subject property; he assumes it was the Respondent.

¹⁶ The Claimant did not seek reimbursement for damaged items in the room below. Consequential damages are not recoverable. See COMAR 09.08.03.03B(1)(a).

12. On or about August 5, 2018, the Claimant contracted with R. Solomon Construction Co., Inc. (Solomon) for \$22,100.00 to repair and complete the Contract.

13. Claimant sustained an actual loss of \$20,553.13 as a result of the Respondent's acts or omissions.¹⁷

DISCUSSION

In this case, the Claimant has the burden of proving the validity of the Claim by a preponderance of the evidence. Bus. Reg. §8-407(e)(1); State Gov't §10-217; COMAR 09.08.03.03A(3). “[A] preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces . . . a belief that it is more likely true than not true.” *Coleman v. Anne Arundel Cty. Police Dep’t*, 369 Md. 108, 125 n.16 (2002) (quoting *Maryland Pattern Jury Instructions* 1:7 (3d ed. 2000)).

An owner may recover compensation from the Fund “for an actual loss that results from an act or omission by a licensed contractor.” Bus. Reg. § 8-405(a); *see also* COMAR 09.08.03.03B(2) (“actual losses . . . incurred as a result of misconduct by a licensed contractor”). “[A]ctual loss’ means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement.” Bus. Reg. § 8-401. For the following reasons, I find that the Claimant has proven eligibility for compensation.

The Respondent was a licensed home improvement contractor at the time he entered into the Contract with the Claimant. The Claimant testified that he relocated to Maryland as a result of a United States military base realignment and closure and purchased the subject property. At or near the time of purchase, his real estate agent referred him to the Respondent for potential home improvement projects. Thereafter, in 2013 and 2014, the Claimant contracted with the

¹⁷ As discussed below, the Claimant may recover only \$17,100.00 from the Fund.

Respondent to perform several first floor and basement projects, which were completed without incident. As a result of this past relationship, the Claimant selected the Respondent to perform the master bathroom renovation which was the subject of the hearing. The Claimant testified that there was no signed "contract" between the parties; instead, the Contract consisted of three invoices prepared by the Respondent which encompass the scope of work. (Clmt. Exs. 2, 3, and 4.) The invoices total \$18,646.87.

The Claimant realized the Respondent's quality of work was inferior to his 2013 and 2014 home improvements after a series of troubling incidents. During a rainstorm, water leaked into the home through an improperly installed shower window. The rainwater damaged the ceiling in the family room below, as well as books, an Oriental rug, and a buffet.¹⁸ A wall erected in the bathroom was not sized properly to allow for the installation of custom shower doors purchased by the Claimant. When the Claimant complained to a tile worker about the shower tile installation, the worker replied that he had never tiled a shower before.¹⁹ In addition, trim work and door sizing were unworkmanlike, and the Respondent never completed the installation of the bathtub.

After the Respondent stopped appearing at the subject property to perform Contract work, the Claimant reached out to understand why the Respondent abandoned the job. The Respondent did not return the Claimant's calls to his cellphone and office numbers. A secretary at the Respondent's office informed the Claimant that the Respondent had a "personal issue" and that she was being laid off. The Claimant testified that he contracted with Solomon for \$22,100.00 to repair and complete the Contract, and that as a result, he is seeking \$22,100.00 from the Fund.

¹⁸ The Respondent paid to have the Oriental rug professionally cleaned.

¹⁹ This conversation resulted in the Respondent agreeing to retile the shower; however, concerns with workmanship persisted.

After consideration of the testimony and the Claimant's documentary evidence, to include photographs of the project, I conclude that the Respondent's work was unworkmanlike, inadequate, and incomplete. I have listed with specificity how the work was unworkmanlike, inadequate, and incomplete in the Findings of Facts. Accordingly, the Claimant is eligible for compensation from the Fund and I must now determine the amount of the Claimant's actual loss and the amount, if any, that the Claimant is entitled to recover. The Fund may not compensate a claimant for consequential or punitive damages, personal injury, attorney fees, court costs, or interest. Bus. Reg. § 8-405(e)(3); COMAR 09.08.03.03B(1). MHIC's regulations provide three formulas to measure a claimant's actual loss, depending on the status of the contract work.

In this case, the Respondent performed work under the Contract, and the Claimant retained Solomon to remedy that work. The Fund recommended applying COMAR 09.08.03.03B(3)(c), and I concur. Accordingly, the following formula appropriately measures the Claimant's actual loss:

If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

COMAR 09.08.03.03B(3)(c).

The calculations when applying this formula are as follows:

Amount paid to Respondent:	\$17,100.00
Amount paid to Solomon to repair unworkmanlike, inadequate, and incomplete work done by Respondent	+ \$22,100.00
	= \$39,200.00
Original Contract price	- \$18,646.87
Claimant's Actual Loss under the Contract	= \$20,553.13

The Business Regulation Article caps a claimant's recovery at \$20,000.00 for acts or omissions of one contractor, and provides that a claimant may not recover more than the amount paid to the contractor against whom the claim is filed. Bus. Reg. § 8-405(e)(1), (5); COMAR 09.08.03.03B(4), D(2)(a). In this case, the Claimant's actual loss of \$20,553.13 exceeds the amount paid to the Respondent. Therefore, the Claimant's recovery is limited to \$17,100.00, the amount paid to the Respondent. Bus. Reg. § 8-405(e)(5); COMAR 09.08.03.03B(4).

PROPOSED CONCLUSIONS OF LAW

I conclude that the Claimant has sustained an actual and compensable loss \$20,553.13 as a result of the Respondent's acts or omissions. Md. Code Ann., Bus. Reg. §§ 8-401, 8-405 (2015). I further conclude that the Claimant is entitled to recover \$17,100.00 from the Maryland Home Improvement Commission Guaranty Fund. Md. Code Ann., Bus. Reg. § 8-405(e)(5) (2015); COMAR 09.08.03.03B(4).

RECOMMENDED ORDER

I **RECOMMEND** that the Maryland Home Improvement Commission:

ORDER that the Maryland Home Improvement Guaranty Fund award the Claimant \$17,100.00; and

ORDER that the Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of ten percent (10%) as set by the Maryland Home Improvement Commission,²⁰ and

²⁰ See Md. Code Ann., Bus. Reg. § 8-410(a)(1)(iii) (2015); COMAR 09.08.01.20.

ORDER that the records and publications of the Maryland Home Improvement

Commission reflect this decision.

February 13, 2020
Date Decision Issued

TJD/sw
#183870

CONFIDENTIAL

Tracey Johns Delp
Administrative Law Judge

PROPOSED ORDER

WHEREFORE, this 6th day of April, 2020, Panel B of the Maryland Home Improvement Commission approves the Recommended Order of the Administrative Law Judge and unless any parties files with the Commission within twenty (20) days of this date written exceptions and/or a request to present arguments, then this Proposed Order will become final at the end of the twenty (20) day period. By law the parties then have an additional thirty (30) day period during which they may file an appeal to Circuit Court.

Joseph Tunney

Joseph Tunney

Chairman

Panel B

***MARYLAND HOME IMPROVEMENT
COMMISSION***